Supreme Court, U. S.
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In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-539.

STATE OF MAINE,
PETITIONER,
v.
CHARLES ALBERT DANA, JR.,
AND
ALLAN SOCKABASIN,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

Petitioner State of Maine's Supplemental Brief in Reply to Memorandum for the United States as Amicus Curiae.

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Petitioner State of Maine's Supplemental Brief in Reply to Memorandum for the United States as Amicus Curiae.

This supplemental brief is submitted by the Attorney General of the State of Maine, on behalf of the petitioner State of Maine, in reply to the Memorandum for the United States as Amicus Curiae.

Argument.

Contrary to the contentions of the United States, the decision below is in conflict with the decisions of this Court and evidences the peculiar gravity and general importance which justify the granting of certiorari.

1. Although it concedes that the Indian Trade and Intercourse Act of 1834[1] is inapplicable to eastern states,[2] *Wilson* v. *Omaha Indian Tribe*, Nos. 78-160, 78-161, 47 U.S.L.W. 4758 (June 20, 1979), the United States contends that "any geographic limitation in [that] Act is irrelevant" to this case. Memo. 12. The United States fails to recognize, however, that the most fundamental predicate of the decision below was the Maine Supreme Judicial Court's determination that *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F. 2d 370 (1st Cir. 1975), "must be regarded as having correctly decided that the Indian Trade and Intercourse Acts [apply] to each and every bona fide tribe of Indians occupying lands . . . situated *anywhere* in the United States." Pet. App. A21 (emphasis added). This finding led the court below to conclude that all bona fide tribes, wherever located, were "dependent Indian communities" within the meaning of 18 U.S.C. § 1151(b). The geographic applicability of the Indian Trade and Intercourse Acts, thus, was critical to the decision below. The Maine Supreme Judicial Court's and the *Passamaquoddy* court's conclusions that there were no geographic limitations on the applicability of the Trade and Intercourse Acts are in direct and irreconcilable conflict with *Wilson*.

This Court's decision in *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974), does not provide, as the United States contends, the "full answer." Memo. 12. In *Oneida*, the narrow issue was whether a claim of right to possession of land based upon one section of the Trade and Intercourse Act of 1834 (now codified at 25 U.S.C. § 177) stated "a federal controversy within the jurisdiction of the District Court." 414 U.S. at 666. In holding that such a Trade and Intercourse Act claim stated a federal question, this Court noted that "[t]he rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13." 414 U.S. at 670 (*dictum*). The Court made it clear, however, that it was not deciding the question of the geographic applicability of the Trade and Intercourse Acts when it went on to state that ". . . the controversy alleged in the complaint may well depend on what the *reach* and impact of the federal law will prove to be in this case." 414 U.S. at 679 (emphasis added).[3] *Oneida* thus left undecided the issue eventually resolved by *Wilson*.[4]

2. The United States claims that the impact of the decision below is confined to Indians within "state reservations" and that the importance of this "interesting and difficult question" is consequently diminished. Memo. 4-5. This contention fails to acknowledge that the broad standards enunciated by the Maine Supreme Judicial Court can be read to apply to nonreservation lands subject to Indian claims. At least one criminal

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[1] Act of June 30, 1834, ch. 161, 4 Stat. 729.

[2] *Memorandum for the United States as Amicus Curiae* 11 (hereinafter "Memo.").

[3] Assuming *arguendo* that *Oneida* can be read to construe the Trade and Intercourse Acts to apply within the original thirteen states, *Oneida* and *Wilson* are easily harmonized. Certain portions of the "Indian country" boundary passed through some of the original thirteen states. At various times, portions of New York, Pennsylvania, North Carolina and Georgia were located within "Indian country." Thus, the Trade and Intercourse Acts applied to the original thirteen states to the extent that those states were located within "Indian country."

[4] This Court's decision in *United States* v. *Wheeler*, 435 U.S. 313, 326 (1978), sheds no light on the issue of geographic applicability of the Trade and Intercourse Acts.

prosecution against an Indian involving a crime committed on nonreservation lands to which the Maine Indians claim title has been dismissed on grounds related to the decision below. *State* v. *Francis*, Maine District Court, Division of Northern Penobscot, Docket No. 78-79-2272 (July 18, 1979). The practical impact of the decision below is not confined to a few "state reservations" as the United States implies. Rather, the decision below impacts upon the administration of criminal justice on 10-12 million acres of land in the State of Maine and lands subject to Indian claims in the States of Massachusetts, Connecticut and South Carolina.[5]

3. The United States asserts that federal recognition of the Passamaquoddy and Penobscot Tribes has negated the long term effect of the decision below. Memo. 9. The recognition of the Passamaquoddy and Penobscot Tribes,[6] however, was the direct result of the First Circuit Court of Appeals decision

[5] The United States asserts that the state reservations of the Passamaquoddy and Penobscot Tribes qualify under 18 U.S.C. § 1151(a) as "land within the limits of any Indian reservation under the jurisdiction of the United States . . .." Memo. 8. Section 1151(a), however, was intended to include only those reservations established and acknowledged by the United States. *See, e.g., United States* v. *McGowan*, 302 U.S. 535, 537 (1938) (cited in Reviser's Notes to 18 U.S.C. § 1151); *Donnelly* v. *United States*, 228 U.S. 243, 253 (1913) (cited in Reviser's Notes to 18 U.S.C. § 1151). There is no evidence that, in enacting § 1151(a), Congress intended to include within "Indian country" state created reservations which *always* have been subject to state jurisdiction. Similarly, there is no evidence that Congress empowered the Department of the Interior to withdraw a state created reservation from the jurisdiction of a state by the mere act of agency recognition of tribal existence. *See United States* v. *Martine*, 442 F. 2d 1022, 1024 (10th Cir. 1971) ("The mere presence of a group of Indians in a particular area would undoubtedly not suffice [as a dependent Indian community]").

[6] The Passamaquoddy and Penobscot Tribes were accorded recognition by the Department of the Interior without public notice of the contemplated recognition and without an opportunity for interested parties to submit factual or legal arguments in opposition. *Compare* 25 C.F.R. § 54.8(c) and (d) (1979).

in *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton, supra*.[7] The holding of *Passamaquoddy* is, as discussed above, in direct conflict with *Wilson* v. *Omaha Indian Tribe, supra*. The United States' argument thus presumes that federal recognition of tribal existence resulting from the *Passamaquoddy* court's erroneous interpretation of applicable law can retrospectively validate *Passamaquoddy* and prospectively validate the effects of *Passamaquoddy*. The circularity and invalidity of this reasoning are manifest.

4. The United States claims that this case lacks sufficient general importance to warrant review because there has been no hiatus in law enforcement on the state reservations. Memo. 9 n.5. This argument misses the mark. The question is not *whether* criminal jurisdiction is exercised but rather *which sovereign* is entitled to exercise criminal jurisdiction. It is the radical departure from the "long-standing assumption of jurisdiction" by the State of Maine[8] effected by the decision below which is challenged here.[9]

[7] In a letter received by the Secretary of the Interior on June 9, 1977, from the Commissioner of Indian Affairs, the Commissioner stated:

> We are not initiating services but are extending them as the result of a court order. Put simply, we have concluded tribes exist and the court has ordered us to "protect" the tribal lands. These are significant conclusions. In the absence of them, we would not be considering programs for the Passamaquoddy and Penobscot people.

[8] *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 603-05 (1977).

[9] The United States also argues that a settlement of the land claims of the Passamaquoddy and Penobscot Tribes is likely to resolve statutorily the issue of criminal jurisdiction over Indians in the State of Maine. The simple rejoinder to this contention is that no settlement has been agreed upon to date.

Conclusion.

For the above stated reasons, a writ of certiorari should issue to review the judgment and opinion of the Maine Supreme Judicial Court.

Respectfully submitted,
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